2009

Branson G. Neff v. Marvin G. Neff : Reply Brief of Cross Appellant

Utah Court of Appeals

James E. Magleby; Christopher M. Von Maack; Magleby & Greenwood; Attorneys for Appellee.
Marlin J. Grant; Olson & Hoggan; Attorneys for Appellant.

Marlin J. Grant (#4581)
James C. Jenkins (#1658)
OLSON & HOGGAN, P.C.
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84323-0525
(435) 752-1551
Attorneys for Defendant/Appellant, Marvin G. Neff, ABCO Construction, and WESTCo

IN THE UTAH SUPREME COURT

BRANSON G. NEFF, an individual, Plaintiff/Appellee, vs. MARVIN G. NEFF, an individual, TRAVIS L. BOWEN, ESQ., an individual, TRAVIS L. BOWEN, P.C., a Utah professional corporation, ABCO CONSTRUCTION, INC., a Utah corporation, and WESTCo, an unregistered partnership between BRANSON G. NEFF and MARVIN G. NEFF , Defendants/Appellants.	Appellate No. 20080850 First District Court No. 030100275

REPLY BRIEF OF CROSS APPELLANT

Appeal from the
First Judicial District Court, Cache County, Utah
Honorable Gordon J. Low

James E. Magleby
Christopher M. Von Maack
MAGLEBY & GREENWOOD, P.C.
170 South Main Street, Suite 350
Salt Lake City, Utah 84101
Attorney for Plaintiff /Appellee

Marlin J. Grant (#4581)
OLSON & HOGGAN, P.C.
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84321
Attorneys for Defendant /Appellant

Marlin J. Grant (#4581)
James C. Jenkins (#1658)
OLSON & HOGGAN, P.C.
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84323-0525
(435) 752-1551
Attorneys for Defendant/Appellant, Marvin G. Neff, ABCO Construction, and WESTCo

IN THE UTAH SUPREME COURT

BRANSON G. NEFF, an individual, Plaintiff/Appellee, vs. MARVIN G. NEFF, an individual, TRAVIS L. BOWEN, ESQ., an individual, TRAVIS L. BOWEN, P.C., a Utah professional corporation, ABCO CONSTRUCTION, INC., a Utah corporation, and WESTCo, an unregistered partnership between BRANSON G. NEFF and MARVIN G. NEFF , Defendants/Appellants.	Appellate No. 20080850 First District Court No. 030100275

REPLY BRIEF OF CROSS APPELLANT

Appeal from the
First Judicial District Court, Cache County, Utah
Honorable Gordon J. Low

James E. Magleby
Christopher M. Von Maack
MAGLEBY & GREENWOOD, P.C.
170 South Main Street, Suite 350
Salt Lake City, Utah 84101
Attorney for Plaintiff /Appellee

Marlin J. Grant (#4581)
OLSON & HOGGAN, P.C.
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84321
Attorneys for Defendant /Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules and Statutes:

Defendant, Appellee and Cross Appellant, Marvin G. Neff (hereinafter "Marvin") through counsel, Olson & Hoggan, P.C., hereby submits this Reply Brief of Cross Appellant in support of Marvin's request for attorney fees.

INTRODUCTION

Branson has admitted that there are only three remaining issues on this appeal: (1) whether the trial court erred in granting JNOV against Branson with respect to the jury's specific award of attorney fees as special damages; (2) whether the trial court erred in granting partial summary judgment on Branson's malicious prosecution claim, and (3) whether the trial court errored or abused its discretion in finding that Marvin was not "the prevailing party," thereby denying his request for attorney fees on the Manila Ranch case as well as all pre-trial ABCO motions. Branson stipulated to the correction of principal and interest, thus awarding Marvin all principal and interest sought on the Manila Ranch case. By so doing, Branson made it clear that Marvin was the prevailing party on the Manila Ranch case, which was a separate-bifurcated matter. The net award Marvin received from the Manila Ranch trial was $27,865.00 in principal, plus $17,736.17 in interest, for a judgment total of $45,601.17. Branson's defenses were denied entirely. Note, this award far exceeded Branson's award of $8,999.00 in the ABCO trial.

Branson continues to argue inappropriately that it is Marvin's burden to marshal the evidence regarding Branson's attempt to overturn the JNOV ruling. The trial Judge was a fact finder and listened to this case for over six years. There was no reason to marshal the

evidence for the trial Judge. He heard all of the facts. However, when Branson challenged the Judge's JNOV decision on appeal, the Appellate Court does not have the benefit of all of those facts and it is Branson's duty, as Appellant, to marshal. The simple solution on this appeal lies in paragraph 6.C. and 8.C. of the Special Jury Instructions which state:

> "If the jury awarded Branson damages under paragraph (A), does the jury find that Marvin should be held to pay Branson's attorney fees?" (Emphasis added).

Because the jury awarded Branson zero damages under paragraph A, the "if" language in paragraph C made it clear that the jury should not have even answered the rest of that sentence. Judge Low appropriately so held and Branson's bad faith attempt to use the jury foreman affidavit to delve into the mind, thoughts, and mental processes of the jury are totally inappropriate.

Branson failed to rebut the summary judgment decision on malicious prosecution because he could not establish the necessary prima facie elements with sufficient evidence to support a malicious prosecution action. The trial court found that Marvin had shown probable cause, that Branson was in deed guilty of violating the protective order and was not innocent on the altercation since he knowingly drove recklessly down the highway while Marvin was pleading for his life, and that Marvin was justified in enforcing the protective order. Branson would like us believe his bald assertion that Marvin lied about the whole event, but Branson can only point to a hearsay affidavit of a neighbor that shows nothing of the sort. The malicious prosecution summary judgment was proper.

This reply brief is submitted to demonstrate that Marvin is entitled to attorney fees for successfully defending and upholding the contract as binding as well as clearly prevailing on

the bifurcated Manila Ranch trial for three reasons:

1. The evidence is overwhelming that Marvin prevailed on the pre-trial motions to uphold the contract as well as being awarded $45,000.00 in the Manila Ranch trial. The majority of Branson's case was dismissed in pre-trial motions. The contract was upheld as binding and enforceable. After four years of litigation, Branson could not show any evidence of fraud to avoid the contract.

The Manila Ranch trial was separate and bifurcated because Branson asked that it not be part of the ABCO trial. The ABCO litigation was conducted in two phases: (1) the pre-trial dispositive motion phase and (2) the jury trial phase. Judge Low's decision dated June 19, 2007 and November 6, 2007 clearly bar both parties from attorney fees for the breach of contract issues in the ABCO trial, but attorney fees on the Manila Ranch case and ABCO pre-trial motions were reserved and Marvin never even asked for those fees until November 20, 2007.

2. Where Marvin so clearly prevailed on separate pre-trial issues and Manila Ranch, it is an abuse of discretion for the court to deny Marvin's attorney fees as a matter of law, unless three extraordinary instances appear in the findings, which instances are:

a. The prevailing party received equitable value in a forfeiture case that supplants attorney fees.

b. The prevailing party was offered a generous settlement, refused the settlement and proceeded to trial and then received a jury award similar to the settlement offer, or

c. The prevailing party was part of the cause of the default under the contract and acted improperly.

As will be shown below, Marvin does not fit into any of these extraordinary instances and should have received his attorney fees.

3. The proper review of the July 25, 2008 final decision by Judge Low shows that the Judge made conclusions and orders by generalizing the evidence without actually listing specific facts applicable in the findings to support the conclusions. Without adequate findings, it is impossible to decide if Judge Low's conclusions were properly made. Thus, the case must be remanded.

Lastly, it is inappropriate for Branson to use a juror affidavit which discusses the mental deliberations and emotions of the jury. There is nothing in the affidavit that talks about the fact that the jury was confused or made a mistake. The affidavit was never entered or used as evidence, was specifically forbidden by Judge Low and inappropriately filed by Branson without notice to opposing counsel. There were no damage calculations made in the special jury verdict that were in error. That is the only time a jury affidavit can be used to show mistake. The fact that the jury may have been confused by instructions which Branson approved, if they were confused, is not grounds to assert an affidavit for evidence. Branson should be sanctioned for improper use of the affidavit.

REPLY FACTS WHICH BRANSON HAS TRIED TO CONFUSE

1. Branson first tries to confuse facts by arguing that Marvin sought damages of approximately $1,500,000.00 in his initial cross complaint, but ignores the fact that soon

thereafter, during the proceedings, Marvin never sought damages. In the Paul Felt mediation, Marvin never sought any damages and actually was willing to give Branson the retirement account known as the "Salary Continuation Fund" worth $250,000.00, plus give to Branson all of the Manila Ranch property, which totaled over $95,000.00 in cash ($45,000.00 awarded to Marvin, plus $50,000.00 of Marvin's still in Manila escrow), plus 26 acres just to settle the entire matter. Branson refused the offer and marched forth to trial, seeking over $1 million in general damages, plus five (5) times that sum in punitive damages. Branson claims he is confused regarding how Marvin arrived at Branson's requested damages of $5,304.070.00. When you divide $5,304,070.00 by six (5 times for punitives plus one for actual damages) which was Branson's own formula for punitives, it explains the number arrived at.

2. Branson belittles Marvin's claim in the ABCO jury trial of only $1.00. Branson claims he had done such a masterful job convincing the jury of Marvin's poor defense that Marvin decided to raise a white flag and ask for only $1.00. The truth, as Judge Low acknowledges, was Marvin could have sought more damages, but Marvin choose to merely defend against Branson's claims and get his life and family back. R. 11356, 11483, Transcript on April 16, 2007, page 6. Moreover, Branson never compares Marvin's $45,000.00 Manila judgment to Branson's $9,001.00 jury verdict for obvious reasons.

3. Marvin eventually won everything he asked for in the separate Manila Ranch trial. He was awarded $45,000.00 plus the $50,000 held in escrow. Branson leaves this out entirely. Marvin also successfully blocked Branson's jury claim to obtain $250,000.00 from

the Salary Continuation Plan. Branson was only awarded $9,000.00 on his breach of contract claim in the ABCO trial, which Judge Low found nominal or *de minimus* and said he would have awarded nothing. R. 11483, page 5.

4. Branson inappropriately confuses the issue of how much the brothers sought at the ABCO trial. During mediation and afterwards, Marvin made it clear he was defending against Branson. Marvin only asked for $1.00 on his trial claims because he was purely defending against his brother's attack. Branson, on the other hand, asked not only for principal and interest exceeding $879,000.00 (R. 8585-8587), but also for five times that award in punitive damages, plus attorney fees of $377,000.00. The jury only awarded Branson $9,001.00 for all of Branson's claims, which truly is *de minimus*. Branson claims Marvin's $2.00 jury award is really small, instead of acknowledging it was 100% of what Marvin sought as stated by Judge Low. R. 11483, Transcript April 16, page 6.

5. Branson also ignored the fact that it took nearly five (5) years of litigation plus a trial on August 29, 2007 to obtain the $45,000.00 from Manila Ranch that Marvin was entitled to receive. Judge Low denied all of Branson's requested Manila offsets in the July 25, 2008 decision.

6. Branson confuses the November 6, 2007 reconsideration decision, which must be read in conjunction with the June 19, 2007 decision, which Judge Low was reconsidering. These two decisions only covered Branson's request for attorney fees. Marvin never even filed an affidavit for cost and attorney fees until November 20, 2007, and then only on pre-trial motions and Manila Ranch. The trial court viewed neither party as a prevailing party

with regard only to the trial phase of the ABCO case. Trial judge limited his decision on attorney fees to the contract breach claims made during trial. The trial court obviously reserved Marvin's attorney fee request on who was the prevailing party on pre-trial motions in the ABCO matters (R. 11190) as well as the Manila Ranch case. R. 11484, pages 140-143.

7. The Neff Family Trust, dated August 19, 1984, as Exhibit 1 in the Manila Ranch trial, paragraph 9.10, indicates that a Trustee can appoint, employ and pay such agents and employees as the Trustee deems necessary, including attorneys. Normally those fees are paid from the trust estate. Marvin was a Co-Trustee and his fees should have come from Branson's share of the Trust estate. In addition, the Manila Ranch sale to the Pallesens also included a provision in the Trust Deed Note and the Trust Deed for attorney fees should any party have to initiate enforcement of those documents. The sales contract required the installments to be split 50/50. Branson didn't divide the Trust Deed Note installments with Marvin as he should have and made other misappropriations. (See also Agreement, Manila Ranch Exhibit 7). Marvin should be entitled to his attorney fees under the reciprocal provisions of Utah law. Additionally, Section 75-7-1004(1) indicates that the court can award reasonable attorney fees to any party who prevails against a trustee. Branson has cited no facts in the July 25, 2008 decision that the court ever ruled on the Manila Ranch attorney fees because there are none.

ARGUMENT

POINT I

MARVIN WAS THE PREVAILING PARTY ON BOTH THE ABCO PRE-TRIAL MOTIONS AS WELL AS THE MANILA RANCH BIFURCATED TRIAL

Branson has not and cannot dispute that Marvin prevailed on all pre-trial motions to enforce the contract and uphold its validity against Branson's claims that it was void or voidable, or that he could rescind it for fraud, mistake, deceit, failure to disclose, agreement to agree, condition precedent, or any other legal theory. The trial court ultimately held on January 9, 2007, after four years of litigation, that the Buyout Contract in the ABCO case was fully enforceable. There is no question under the law, as provided in *Chase v. Scott*, 2001 UT App. 404, 38 P.3d 1001 (Utah Ct. App. 2001), that a party who successfully defends against an opponent's suit to rescind the contract is entitled to an award of attorney fees and costs incurred in said defense.

Nor is there any question that Marvin won everything he asked for in the separate-bifurcated Manila Ranch trial. This was readily confirmed by the parties' recent stipulation, after Marvin filed his brief on appeal to correct the clerical error and seek proper interest. Branson stipulated to correct the clerical error and to pay the proper interest. Marvin was awarded $27,865.00 in principal and $17,736.17 in interest for a total of $45,607.17. Branson's defenses of statute of limitations and set off in the Manila Ranch case were defeated. If you were to compare Branson's limited success on his $9,000.00 contract breach claim to Marvin's $45,601.17 success in the Manila Ranch claim, there is no question that

Marvin received a greater award and was thus the prevailing party. Marvin was the prevailing or successful party on the pre-trial motions on ABCO/Aspen Springs and the bifurcated Manila Ranch trial, using either the net judgment rule or the flexible and reasoned approach.

Branson attempts to argue that Judge Low made an all encompassing decision that neither party prevailed when you analyze the whole case together, which theory ignores what Judge Low actually ruled; i.e. that neither party prevailed on the **contract breach claims in the ABCO trial**. For instance, the Findings of Fact and Conclusion of Law entered June 19, 2007 regarding Branson's request for attorney fees on the ABCO trial specifically held that Branson was not the prevailing party on the issues of contract and that Branson's attorney fees were unreasonable. R. 10566. The Court later clarified this Order in the reconsideration decision on November 6, 2007 as follows:

> "...the Court finds that neither party is justified in receiving attorney's fees in regards to the breach of contract issue. The Court finds that even if the parties were justified in receiving attorney's fees, the fees would offset one another. **Therefore, Attorney's fees in regards to the breach of contract issue will not be awarded to either party."** (Emphasis added). R. 11190-11191.

Note, it was after this date that Marvin requested attorney fees on November 20, 2007 on all pre-trial ABCO motions to "enforce the contract" for which he was successful. The Manila Ranch case was still being scrutinized for Branson's offset claims, and Marvin's attorney fees thereon were specifically reserved until the offsets were determined. The trial court eventually ruled on July 25, 2008 that Branson was not entitled to any offsets.

Arguably, by the time Judge Low made a final decision of July 25, 2008, he lost focus

on Marvin's separate claims for attorney fees. In fact, it appeared in the record (R. 11352-11353) that Judge Low reverted to the breach of contract claims in the ABCO trial while ignoring entirely Marvin's reserved request for attorney fees on Manila Ranch. Although Judge Low briefly stated: "The Defendant has also sought his Pre-trial attorney fees and costs as they relate to the Aspen Spring/ABCO portion of this bifurcated action." (R. 11353). He seemed to forget the enormity of four years of pre-trial motions and focused instead on Marvin and Branson's contract breach claims and associated attorney fees. For instance, Judge Low states:

> "(Defendants) Claims, except breach of contract by the Plaintiff were voluntarily withdrawn by the Defendant before the matter was submitted to the jury. On the Defendant's breach of contract he requested and was awarded one dollar ($1.00).
>
> Both parties cite the contractual language in case law in support of their claims. The Defendant also graphically sets forth the Plaintiff's claims and the Plaintiff's failure to receive any awards thereon." R. 11352.

In fact, the only claim Branson was successful on was the breach of contract claim for $9,000.00. The trial court found that Branson's recovery would "generously be described as nominal and more accurately *de minimus* in its nature and amount." R. 11352.

A possible explanation for the above confusion lies with Judge Low retiring on August 31, 2007. He never really looked at the case thereafter until the summer of 2008, and again focused primarily on his experience in the ABCO trial on the breach of contract and other trial claims. He found that neither party would be awarded attorney fees on those claims since neither could be determined as the prevailing party on breach of contract.

Careful review of the July 25, 2008 decision shows that Judge Low failed entirely to

even mention attorney fees regarding the Manila Ranch claim. See R. 11353. The only clear conclusion from these three decisions by the trial court was that neither party prevailed on the breach of contract or other trial claims in the ABCO trial, but Marvin's Manila Ranch success was entirely overlooked and Marvin's pre-trial motion success in the ABCO case was given little or no consideration. Marvin is entitled to proper findings of fact and a separate ruling on Manila Ranch for attorney fees. Unquestionably, Marvin prevailed, was awarded $45,000.00, while Branson's defenses were all denied. The Manila trust document, trust deed note, trust deed and the trust statute all suggest the prevailing party is entitled to attorney fees.

Additionally, the ABCO/Aspen Springs case was litigated in two phases: (1) the pre-trial dispositive motions and (2) the remaining issues at jury trial. The pre-trial dispositive motions were decided in Marvin's favor and took up the bulk of the case for over four (4) years. Marvin should have been awarded his attorney fees for successfully upholding and enforcing the contract as a binding document. To hold otherwise encourages or allows bad faith litigants to file frivolous claims to overturn a binding contract based on unsupportable allegations of fraud with no consequences. Branson tied up Marvin's resources and the Court's time for four years with no consequence. As Judge Low aptly stated in paragraph 14 of the Findings of Fact entered June 19, 2007:

> "Plaintiff incurred his attorneys fees primarily on causes of action which were either dismissed or for which attorney fees are not recoverable. For instance, Plaintiff's claim to set aside the subject contract on grounds of fraud consumed substantially all of the pre-litigation motions and was totally unmeritorious. After four years of litigation, Plaintiff could not substantiate the fraud claim with any evidence."

Branson should be required to pay Marvin's attorney fees to defend against four (4) years of frivolous or unmeritorious pre-trial litigation and the separate trial where Marvin prevailed on $45,000.00 in the Manila Ranch case, which took nearly six years to resolve.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IGNORED MARVIN'S PREVAILING STATUS AND AWARDED MARVIN NO ATTORNEY FEES.

Utah follows the American rule regarding awards of attorney fees, *Cobabe v. Crawford*, 780 P.2d 834, 835 (Utah Ct. App. 1989):

> "This general rule requires each party to bear his or her own attorney fees in the absence of a statute or enforceable contractual provision to the contrary ... If a contract provides for an award of attorney fees, 'the court may award attorney fees in accordance with the terms of the parties' agreement. *Trayner v. Cushing*, 688 P.2d 856, 858 (Utah 1984)." (Id. at 835).
>
> "'Provisions in written contracts providing for payment of attorney fees should ordinarily be honored by the Court.'"

Cobabe, at 836 (quoting *Stacey Properties vs Wixen,* 766 P.2d 1080, 1085 (Utah Ct. App. 1988)).

> "Furthermore, contrary to...[the] contention that attorney fees should be determined on the basis of an equitable standard, attorneys fees, when awarded as allowed by law, are awarded as a **matter of legal right**."

Cabrera v Cottrell, 694 P.2d 622, 625 (Utah 1985) (emphasis added).

> "'Since the right is contractual, the court does not possess the same equitable discretion to deny attorney's fees that it has when fashioning equitable

remedies, or applying a statute which allows the discretionary award of such fees.'"

Cobabe at 836.

Thus, when a party, such as Marvin, has prevailed on a contract action, attorney fees should be awarded as a matter of legal right.

1. Branson has tried to say he should be awarded fees and Marvin should not.

There are three extraordinary situations where courts, in their discretion, have declined to award attorney fees to a prevailing party in spite of an enforceable contractual or statutory provision. For instance, in *Cobabe* at 836 the Court cited denial of attorney fees to a prevailing party was not an abuse of discretion if it was based on forfeiture, or settlement offers prior to trial that were very close to the actual trial award, or where the prevailing party showed improper conduct.

The first type of case, forfeiture, must generally involve a prevailing party who received a sizeable equity award back because of the forfeiture. See *Fullmer v. Blood*, 546 P.2d 606, 610 (Utah 1976) (where Plaintiff/Seller had already received $12,150.00 from the purchaser, which was forfeited and not recoverable to the Defendant/Purchaser. The Court reasoned that a suit of this nature, involving the invocation of a forfeiture, involves equitable principles which should be addressed to the conscience and discretion of the trial court). Note, however, *Neff v. Neff* does not involve a forfeiture of real estate and neither brother received any equitable right over the other as a result.

The second instance is when the prevailing party refused generous offers of settlement

prior to the trial then forged ahead to trial and received an equal or slightly higher award. See *Cable Marine, Inc. v. M/V Trust Me II,* 632 F.2d 1344 (5th Cir. Fla. 1980) (where the Court found that because Plaintiff filed suit to recover cost of repairs and the Defendant offered reasonable solutions to correct those repairs, including two solutions that were only slightly less than the total cost of repairs, the Court affirmed the trial court's denial of Plaintiff's attorney fees since Plaintiff had acted unreasonably in not accepting either of the earlier settlement offers made by Defendant and forced the cause to trial). The Court went on to posit:

> "Although plaintiff may have been compelled to initiate a lawsuit to recover the repair costs, the district court could well have concluded that plaintiff acted unreasonably in incurring needless expense by pursuing the suit beyond the offers of payment." Id. at 1345.

Similarly, in this case, Branson refused reasonable offers to settle and incurred unreasonable expense by forging ahead, eventually receiving much less, but actually paying Marvin nearly $36,000.00, net. Marvin was forced to refuse Branson's un-reasonable offers of over $800,000.00 on ABCO and zero on Manila Ranch. Marvin even reduced the cost to pursue the Manila Ranch case by proffering evidence and stipulating on the first day of trial to the award. Branson, by comparison, in the ABCO case, refused Marvin's generous offer to give Branson the Salary Continuation retirement benefits of $250,000.00 plus over $95,000.00 on the Manila Ranch properties. Instead, Branson plowed ahead to a three week jury trial, was awarded nothing on the Salary Continuation, was only awarded $9,000.00 on the breach of contract, and was awarded zero offsets on the Manila Ranch case. It is obvious that the Trial court could have denied all of Branson's attorney fees for his unreasonable

expense after the pre-trial settlement offers. However, it would be totally unreasonable for the Court to apply that same theory to Marvin since Marvin actually won far beyond what he offered, and Branson lost over $800,000.00 based on his offer.

The third case cited by *Cobabe* in which a Court can deny the prevailing attorney fees is if the prevailing party acted improperly or in bad faith. See *United States use of A.V. De Blasio Constr. CO., Inc. v. Mountain States Constr. Co.,* 588 F.2d 259 (9th Cir. Wash. 1978) and *Annotation, When may federal court declined to award the prevailing party attorney fees authorized by contract*, 56 A.L.R. Fed. 871. In *Mountain States Constr. Co.,* the Court reasoned that because Plaintiff *Deblasio* was partly at fault for his own termination under a contract, which *Deblasio* asked the Court to enforce, for attorney fees, that the Court had discretion to conclude that allowing attorney fees to Deblasio, when he had acted improperly, would be inequitable and unreasonable. 588 F. 2d at 263. Again, there is plenty of evidence that Branson acted improperly in pursuing Marvin, and that perhaps both brothers were at fault for the ABCO trial breach claims, but there are no specific findings were ever made that Marvin acted improperly in pursuing Branson on Manila Ranch or defending the pre-trial motions to avoid the contract. The Findings of Fact and Conclusions of Law entered June 19, 2007 at R. 10563 through 10567, clearly found Branson had been improper:

Finding 11:

> "Plaintiff failed to allocate the attorneys fees to specific causes of action or to causes of action for which recovery of attorneys fees might be allowed."

Paragraph 12:

> "Prior to trial, most of Plaintiff's claims were dismissed . . . . "

Paragraph 13:

> "At trial, Plaintiff sought monetary damages in excess of one million dollars . . . . "

Paragraph 14:

> "Plaintiff incurred attorneys fees primarily on causes of action which were either dismissed or for which attorneys fees are not recoverable. For instance, Plaintiff's claim to set aside the subject contract on grounds of fraud consumed substantially all of the pre-litigation motions and was totally unmeritorious. After four years of litigation, Plaintiff could not substantiate the fraud claim with any evidence . . . . ."

Paragraph 16:

> "...The Court finds that the jury verdict supports the Court's finding that substantially all of Plaintiff's claims were unmeritorious."

Paragraph 17:

> "...The Court finds that Plaintiff unnecessarily and unmeritoriously required Defendants to participate in the litigation, to assert defenses, and to defend against Plaintiff's claims at trial."

Judge Low also ruled:

> "If I find fault in this case, frankly it's the bringing of this action [by Branson] in the first place and prosecuting it." R. 11483 page 7.

> In motion practice and at trial by jury, the Plaintiff failed to recover or succeed on the majority of his claims [17 total claims]. On a single claim described as a breach of contract, the Plaintiff did receive a judgment...the recovery can only generously be described as nominal or more accurately *de minimus* in its nature and amount." R. 11352.

> "The Defendant is even criticized [by Plaintiff] for dismissing the [ABCO] claims made. In this Court's view, both parties should have done so before any action was even filed." R. 11356.

The above finings were all reasons why Branson should not be awarded his fees, but note the trial judge did not specifically find Marvin had acted improperly except in regards to the ABCO trial on breach of contract. R. 11483, page 5. In fact, Judge Low found specifically that Marvin was required to unnecessarily defend against Branson's legal attack on his pre-trial motions (paragraph 17 of June 19, 2009 Order). Marvin was not to blame for defending himself or retrieving money Manila Ranch Branson misappropriated out of the Trust. The court did scold both parties for the excessive number of motions and pleadings and expressed the opinion each should have avoided the lawsuit in the first place. However, Judge Low never asked for evidence on how Marvin tried to resolve the case with Branson. When Judge Low asked Marvin about his sisters, Judge Low found Marvin more than generous, willing to give up over $75,000.00. R. 11484, pages 114 – 116. Thus, because Marvin prevailed and did not fit in the three categories above, it was an abuse of discretion to deny his attorney fees.

2. The Court abused its discretion in failing to review how Marvin tried to settle this case with Branson, that Branson continued to request exorbitant settlement fees, that Marvin was merely defending himself against Branson throughout the case.

Attorney fees incurred by Marvin to successfully defend against Branson's unmeritorious claims to set aside the contract and his unreasonable demands, settlement offers and litigation are the heart of this case. Marvin never wanted this lawsuit; he did try to settle it. He even dismissed all his ABCO/Aspen Springs claims to $1.00, but he wanted his attorney fees if he was ultimately successful. Marvin attempted to resolve this with Branson

when Branson hired attorney Ben Hathaway, before the lawsuit ever began. Marvin signed corrective deeds before the suit began. Marvin mediated with Paul Felt soon after the lawsuit. Marvin released Travis Bowen and tried to narrow the issues, by filing summary judgment motions.

The fact that Judge Low gave up and basically washed his hands of the file after judicial retirement should be considered an abuse of discretion. Clearly, Judge Low was as tired of Branson's continued litigation as was Marvin. To then ignore Marvin's reasonable and separate request for attorney fees just because Branson was so difficult, was improper.

POINT III

THE TRIAL COURT, IN ANY EVENT, FAILED TO MAKE ADEQUATE FINDINGS AND THE FEW FINDINGS MADE DO NOT SUPPORT THE CONCLUSIONS REACHED.

Branson has failed to address whether the Findings of Fact and Conclusions of Law issued by Judge Low are sufficient and adequate given the Manila Ranch trial and the pre-trial motions in the ABCO case. Branson merely claims that Marvin failed to carry his marshaling burden. However, Branson failed to realize that the marshaling burden is lessened or relieved when the judge fails to make detailed findings of fact or said finings are so inadequate or nonspecific that the reviewing court cannot determine how the conclusion was reached. See generally *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day St.s,* 2007 UT 42, P18-P21. Under the title "Clarification of the Marshaling Requirement" the Utah Supreme Court stated:

> "[W]e have used language implying that appellate courts are strictly bound to affirm the accuracy of the ...trial court's factual findings in the absence of marshaling...Despite this language, the marshaling requirement is not a limitation on the power of the appellate courts...It is not, itself, a rule of substantive law...The reviewing court...retains discretion to consider independently the whole record and determine if the decision below has adequate factual support."

Next Branson argues that the trial court properly rejected Marvin's request for separate attorney fee determinations on the Manila Ranch trial, which was bifurcated from the ABCO hearings, as well as the pre-trial ABCO motions, using the global lawsuit approach. Marvin's attorney fee claims were specifically reserved in orders and on the record as separately determinable. There is no dispute that the court never considered the Manila Ranch attorney fees even though Marvin had prevailed completely on Manila Ranch.

Judge Low also advanced little or no effort to examine the success of Marvin on pre-trial motions in the July 25, 2008 decision. Judge Low merely said he was denying the pre-trial motion attorney fees for the same reason as the trial attorney fees, which trial was vastly different than the pre-trial matters.

Branson next claims that Marvin waived any challenge to the sufficiency of the July 25, 2008 trial decision because Marvin did not object to the district court's lack of findings. Marvin could not object because the court never issued a final ruling until July 25, 2008 and in that ruling the court specifically stated, "the Court will address the heart of the matter without further motions, memoranda or other supporting documents or oral argument." (See page 3 of Decision) and, "[t]his will constitute the final order herein and any further relief is to be sought on appeal." (See page 9 of Decision). Thus, Marvin could not waive any

argument about the court's findings since the court refused to hear any further argument, rejected any attempt by either party to make further arguments and required the parties to go directly to the Appellate Court.

Branson next argues that the trial court made appropriate or adequate findings under the flexible and reasoned approach. First of all, even though the court admitted that there was contractual language for awarding attorney fees under a prevailing party approach, the court never examined the Manila Ranch contracts or statute for attorney fees, nor did Judge Low examine the ABCO contracted language to "enforce" the contract on pre-trial issues.

The number of claims, counterclaims and cross claims that the parties had brought for which they were successful, was actually balanced clearly in Marvin's favor. In fact, the court specifically said that of all of Branson's claims (over 17) he was denied recovery on 16 of said claims by either outright dismissal or no damages. Branson was only successful on one claim and that was his breach of contract claim and the court considered that *de minimus*. The rest were considered unmeritorious. Marvin's claims, on the other hand were withdrawn or reduced to $1.00. The court never weighed Marvin's success on all of the pre-trial motions in the final order of July 25, 2008. Judge Low earlier said the majority of Marvin's defense, covering four years of litigation, against Branson's fraud and rescission claims were necessary and that Branson's claims were totally unmeritorious. The court made no mention of Marvin's success of over $45,000.00 on the Manila Ranch bifurcated trial. The court only looked at Marvin's $1.00 recovery in the ABCO trial.

Branson next tries to claim that the court considered the relative importance of the

parties claims. However, there are absolutely no findings comparing the importance of the Manila Ranch $45,000.00 award with the $9,000.00 jury award to Branson. Nor are there any specific findings in the July 25, 2008 decision regarding how monumental Marvin's success was on pre-trial motions even though the court indicated in earlier decisions that that involved the majority of the case and that Branson's claims were totally unmeritorious.

Next Branson tries to claim that the trial court did consider the amounts awarded by the jury. The trial court only considered the amounts awarded in the ABCO jury trial for purposes of breach of contract, R. 11349 and 11353 (comparing $9,000.00 to $1.00, but only on the breach of contract claim). The court, however, never considered Marvin's success on the Manila Ranch claim in that equation.

The truth is, the court's Memorandum Decision was not styled as Findings of Fact or Conclusions of Law, but as a final order. There were no specific fact findings made, only general conclusory statements. The conclusions cannot stand unless they are supported by specific and adequate factual findings. The lack of adequate findings of fact and insufficiencies of evidence leave this court without the ability to make a meaningful review. Thus, the case should be remanded for findings in line with Marvin's success.

RESPONSE TO JUROR AFFIDAVIT

Lastly, Branson attempts to argue that the jury foreman's affidavit is admissible evidence on appeal, to show a mistake. This is completely incorrect for the following reasons:

1. The trial court refused to allow Branson to use the jury affidavit on April 16,

2007.

2. Branson then filed the jury affidavit surreptitiously on April 30, 2007 after oral argument, without including a mailing certificate to opposing counsel.

3. Branson then attempted to place the jury affidavit in the docketing statement as if it was evidence already considered or used by the trial court. Marvin was never allowed to even cross-examine the foreman or supply rebuttal evidence.

4. Both Utah common law and Federal common law as well as the statute under Utah Rules of Evidence 606(b) make it overwhelmingly clear that juror affidavits cannot be used to delve into the thought processes, speculations or deliberations of the jury, which, this foreman's affidavit grossly does. In fact, nothing in the foreman's affidavit talks about a mistake on the jury verdict form. Branson's attempt to say that the jury over looked the clear language of question 6C and 8C as a mistake is totally unavailing. The type of mistake where a jury affidavit may help occurs in instances where the jury thought they were awarding $100,000.00 and mistakenly wrote $10,000.00 instead. Although an affidavit for such a mistake may be appropriate, the affidavit in this situation discusses no such mistake and is merely Branson's attempt to taint the verdict. Utah's Rule 606(b) specifically forbids the jury from expressing anything about their deliberations or emotions as influencing the juror or their mental processes in connection therewith. This particular juror affidavit is full of the jury's emotions, mind set, and influences thereon in connection with the award.

Marvin already made it clear in his response in support of motion to strike the juror affidavit that there was no error in the calculation of the amount of verdict, i.e. $9,000.00 or

zero. Only the Judge was to calculate attorney fees. Judge Low ruled that Branson was not entitled to any attorney fees in any event. Additionally Branson did not object to the language of the special verdict and cannot now complain that said language confused the jury. The jury clearly wrote zero damages in paragraph 6A and 8A and paragraph 6C and 8C clearly states, **"If the jury awarded Branson damages under paragraph (A)**, does the jury find that Marvin should be held to pay Branson's attorney fees?" (Emphasis added.) There is no confusion in that language. Since the jury did not award Branson any damages under paragraph A where they wrote zero, they should not have checked the attorney fee box. Judge Low correctly ruled.

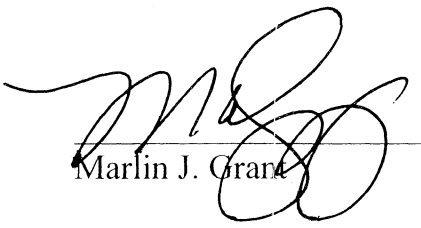
Instead, this case closely resembles the case of *Beldon v. Dalbo, Inc.*, 752 P.2d 1317, 1321 (Utah Ct. App. 1988) (where the jury was confused about comparative negligence, found the motorcycle driver 70% negligent, but then awarded the motorcycle driver $69,083.00 in damages.) The court in Beldon non-suited the action since the motorcycle driver was more than 50% negligent which is very similar to a directed verdict or judgment not withstanding the verdict. The injured motorcycle driver asked for new trial and filed four juror affidavits attaching the same to his brief for the first time, each claiming juror confusion on the instructions. The Appellate Court rejected those affidavits as not properly before the court and specifically cautioned counsel that improper submission of jury affidavits is viewed with extreme disfavor by the Appellate Court. Branson's improper attempt to taint this appeal with inadmissible evidence should be sanctioned with appropriate attorney fees to Marvin.

CONCLUSION

Marvin is entitled to an award of attorney fees under the prevailing party theory using the reasonable and flexible approach, the net judgment rule or any other equitable rule Marvin successfully defended the contract against Branson's major attack during pre-trial motions to set it aside or avoid it. Marvin clearly prevailed on the separate Manila Ranch trial. The only logical conclusion regarding the trial court's final decision is the court focused only on the breach of contract claims, slander of title and breach of fiduciary duty claims of both parties at trial and found neither successful there, and washed those fees. However, the evidence regarding the pre-trial ABCO case and the Manila Ranch matters overwhelmingly justifies remanding this case for findings that support Marvin's request for attorney fees. Marvin asks for all attorney fees to prevail on this appeal.

DATED this 7 day of December, 2009.

OLSON & HOGGAN, P.C.



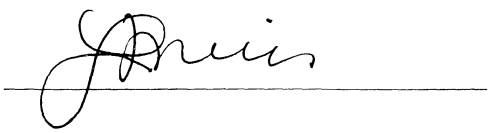
Marlin J. Grant

CERTIFICATE OF MAILING

I hereby certify that on this 7 day of December, 2009, I had delivered one (1) original and nine (9) copies to the Utah Supreme Court, and two (2) true and correct copy of the foregoing **REPLY BRIEF OF CROSS APPELLANT**, to the following:

James E. Magleby
Christopher M. Von Maack
MAGLEBY & GREENWOOD, P.C.
170 South Main Street, Suite 350
Salt Lake City, Utah 84101

Attorney for Plaintiff/Appellee



J:\MJG\Pleadings\neff\Utah Supreme Court\REPLY BRIEF OF CROSS APPELLANT.doc